

January 30, 2019

Mr. David W. Steffensen, Esq.
Law Office of David W. Steffensen, P.C.
4873 South State Street
Salt Lake City, UT 84107

Re: *In the Matter of Kent Hoggan, Frostwood 6 LLC, and David Jacobsen*
OALJ Docket No. CWA-08-2017-0026

Dear Mr. Steffensen:

I am writing regarding Respondents Kent Hoggan and Frostwood 6 LLC's ability to pay claim in the above-referenced enforcement action. On December 14, 2018, Complainant Environmental Protection Agency filed an expert declaration as part of its Rebuttal Prehearing Exchange, regarding significant deficiencies in the Respondents' proof of their inability to pay the penalty sought by Complainant. The Respondents have not filed any supplemental financial information since Complainant's filing of the declaration. Based on both publicly available information and financial and tax information provided by the Respondents, EPA ~~has~~ Consequently, insufficient information is available to the EPA for the agency to evaluate the Respondents' ability to pay claim consistent with EPA ability to pay guidance.

EPA Ability to Pay Guidance

On June 29, 2015, the EPA issued guidance titled, "Guidance on Evaluating a Violator's Ability to Pay a Civil Penalty in an Administrative Enforcement Action," which is available at <https://www.epa.gov/sites/production/files/2015-06/documents/atp-penalty-evaluate-2015.pdf>. CX 68. This guidance supplemented previous EPA guidance on how to assess a violator's claim that it lacks the ability to pay all or part of a civil penalty to be assessed as part of an enforcement action. CX 67. The EPA 2015 guidance at pages 2-4 discusses at length the parties' respective burdens of proof. In particular, the guidance states, "If the respondent puts its ability to pay the penalty at issue, the respondent has the burden of proof to show that (1) the EPA failed to consider all of the statutory factors[] in determining the appropriateness of the penalty, or (2) 'through the introduction of additional evidence that despite consideration of all the factors the recommended penalty calculation is not supported and thus is not 'appropriate'.'" Additionally, the guidance states, "For the respondent to prove its inability to pay the penalty, it must establish that paying the penalty would cause it to suffer an undue financial hardship and prevent it from paying its ordinary and necessary business expenses. [] If the respondent fails to proffer specific evidence or does offer evidence but cannot demonstrate its inability to pay, it has failed to meet its burden.[]"

EPA Efforts to Obtain Information to Evaluate the Respondents' Ability to Pay Claim

The EPA has made concerted and repeated efforts to obtain information to evaluate the Respondents' ability to pay claim since late 2016. In a December 5, 2016 email, Mr. Hoggan ~~raised alluded to~~ potential ability to pay concerns in response to the EPA's November 15, 2016 Revised Inspection Report and Expedited Settlement Offer (ESO). CX 22. That day, the EPA requested email clarification whether the Respondents wanted to formally ~~make~~ raise an ability to pay claim. CX 23. EPA received no response. On December 22, 2016, in an abundance of caution, the EPA ~~provided emailed~~ ability to pay forms (Request for Financial Information from Corporations) to the Respondents and requested a phone call with the Respondents to discuss the ability to pay evaluation process and the clarify the Respondents' intent to complete the forms. CX 24. Again, the EPA received no response. No ~~additional~~ ability to pay discussions took place ~~between the parties~~ until March 20, 2018, when the Respondents formally raised an ability to pay claim in response to the September 27, 2017 Complaint.

~~Since then, (The EPA has devoted substantial resources towards obtaining and evaluating information to support the Respondents' ability to pay claim over the past two years evaluating the Respondents' claims, including utilizing extensive utilization of an in-house staff financial analyst expert and the hiring of an expert contractor, Industrial Economics, Incorporated (IEC). One Respondent, Mr. Jacobsen, provided adequate financial documentation for the EPA to evaluate his claim, which the EPA has deemed legitimate. The EPA's analysis of the documentation found that Mr. Jacobsen's penalty warrants adjustment to a penalty of \$500. Specifically, the EPA renewed its request for information to evaluate the Respondents' claim on May 17, 2018, June 22, 2018, August 2, 2018, and August 13, 2018. CX 48, 56, 58, 60. Only one Respondent, David Jacobsen, has provided adequate financial documentation for the EPA to evaluate his claim. The EPA determined that a penalty of \$500 is appropriate taking into consideration Mr. Jacobson's financial documentation. Despite these numerous requests from the EPA, Respondents Kent Hoggan and Frostwood 6 LLC have not provided adequate financial documentation for the EPA to evaluate their claims as described in more detail below. CX 48, 56, 58, 60.~~

~~As these Respondents have failed to provide documentation supporting their ability to pay claims, the EPA made no ability to pay adjustments for Mr. Hoggan and Frostwood 6 LLC. See *JHNY, Inc.*, 12 E.A.D. at 398-99 ({ TA 1 "*JHNY, Inc.*, 12 E.A.D. 372, 2005 EPA App. LEXIS 22 (EAB 2005)" } "*JHNY, Inc.*, 12 E.A.D. 372, 2005 EPA App. LEXIS 22 (EAB 2005)" } "[B]y not complying with the prehearing exchange requirement to provide documentary evidence demonstrating its inability to pay the proposed penalty, [Respondent] failed to raise its ability to pay as a cognizable issue [and] . . . waived its ability to contest the Region's penalty proposal on this basis."}).~~

EPA Expert Declaration

| The EPA has retained the respected firm of ~~Industrial Economics, Incorporated (IEc)~~, of Cambridge, Massachusetts, to evaluate the Respondents' ability to pay claim. Ms. Czerwonka of IEC, a highly experienced financial expert who has conducted financial evaluations of hundreds of individuals and small businesses, has reviewed the Respondent's financial information contained in their September 20, 2018, Prehearing Exchange. As Ms. Czerwonka states in her

December 10, 2018 declaration, she conducts an ability-to-pay analysis to identify (a) potential sources of funds that might be applied to a penalty assessment, and (b) the implications of those payments on a respondent's future financial stability. To perform a useful and accurate ability-to-pay analysis, EPA's expert needs up-to-date and complete information on a respondent's income, expenses, assets and liabilities, including the status of any loans. The purpose of the analysis is to inform a tribunal's ultimate decision regarding a civil penalty. CX 69.

At the EPA's request, Ms. Czerwonka reviewed more than 1,000 pages of financial and tax documents which the Respondents provided in their Prehearing Exchange. In her declaration, the EPA's expert identified critical deficiencies in the Respondents' financial information, which are summarized below:

- Mr. Hoggan's 2017 individual tax return;
- Mr. Hoggan's complete INDIPAY form detailing potential income sources and available assets, including those that might be available from his spouse, Diane Hoggan;
- Ms. Hogan's Spouse Diane Hoggan's 2015, 2016, and 2017 individual tax returns;
- Loan agreements identifying each loan's date, loan number, lender, borrower, principal amount, loan terms, etc., including loan status; and
- Evidence of Mr. Hoggan's claimed default on the rental agreement for his principal home address and an explanation of how Mr. Hoggan continues to live at the property notwithstanding the default.

Please refer to Ms. Czerwonka's declaration for a complete discussion of these and other deficiencies. ~~Consequently, g~~Given these deficiencies, Ms. Czerwonka concluded that at the time she prepared her declaration she "[did] not have a sufficient basis to conclude that [the] EPA's proposed penalty of \$196,800 should be reduced for ability-to-pay concerns." Complainant EPA has received no additional information since Ms. Czerwonka's December 10, 2018 declaration to cure these deficiencies.

In closing, I wish to reiterate that despite the EPA's concerted and repeated efforts to obtain ~~critical financial and tax information~~ from the Respondents, Respondents Kent Hogan and Frostwood 6 LLC have failed to disclose this ~~critical~~ information to the agency. Please be advised that the EPA remains unable to reduce the proposed penalty due to ~~the~~ Respondents' incomplete documentation of ~~their~~ ability to pay claim. Thank you for your attention to this matter.

Sincerely yours,

Matthew Castelli, Attorney
U.S. Environmental Protection Agency, Region 8